88-104

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Supreme Court, U.S.
FILED
MAY 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

JEAN E. EISHEN,
Petitioner,

v.

HON. FRANK N. KANEY, CIRCUIT JUDGE
OF ORANGE COUNTY COURTHOUSE; ET AL.,
Respondent

Petition for Writ of Certiorari of the United States
Court of Appeals for the Eleventh Circuit

Jean E. Eischen, Pro Se,
Councel of Record,
Polk Correctional Institution,
3876 Evans Rd. Bx.50 (B-52)
Polk City, Fl. 33868-9213

QUESTIONS PRESENTED.

(1) Whether a prisoner is unconstitutionally denied the right to access to the courts in civil proceedings in which property rights are at stake thereto?

(2) Is the lack of availability in state law to a petition for a Writ of Habeas Corpus ad Testificandum for prisoners a violation of Due Process and access to the courts?

(3) Does Price v. Johnson, 334 U.S. 266 (1949) bar prisoners from access to the courts when the civil litigation is initiated by someone other than the prisoner?

(4) Was Petitioner's right to a fair trial violated by the lower-tribunal's order denying Petitioner to be present, or represented thereto, after continuance to procure new counsel was sought?

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TABLE OF AUTHORITIES CITED
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Kluger v. White, 281 So.2d 1, 4 (1973) 6

Lloyd v. Fakash, 476 So.2d 305, at 307 (Fl. 1st DCA 1985) 6

McQuiston v. Wanicka, 483 So.2d 489 (Fl.2d DCA 1986) 6

Price v. Johnson, 334 U.S. 266 (1948) 5

Rashad v. Cappiali, 171 So.2d 581, 583 (Fl. 3d DCA 1965) 7

Rivera v. Santirocco, (41 Cr.L 2058)(Ca2 3/23/87) 6

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28 U.S.C. § 294

28 U.S.C. § 1254

28 U.S.C. § 1651

No.

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October Term 1988

JEAN E. EISCHEN,
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HON. FRANK N. KANEY, CIRCUIT JUDGE
OF ORANGE COUNTY COURTHOUSE; ET AL.,
Respondent.

Petition for writ of Certiorari of the United States Court of Appeals for the Eleventh Circuit

OPINIONS BELOW

The Court of Appeals entered its Memorandum decision summarily denying appeal based upon lack of jurisdiction on the 9th day of February, 1988. (Appendix A)

The Court denied Petitioner's petition for rehearing and suggestion for en banc consideration upon the 8th day of March, 1988. (Appendix B)

JURISDICTION

On the 9th day of February, 1988, the Court of Appeals entered a judgment dismissing appeal on basis of motion by Respondent, Kaney, based upon

a claim of lack of jurisdiction and availability of state remedies. (App. A)

Therefore invoking this Honorable Court's jurisdiction under Title 28 USC § 1254(1)

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendments IV, V, and XIV.

"...Nor shall any person...be deprived of life, liberty or property, without due process of law..."

"...The right of the people to be secure in their houses, papers, and effects, against unreasonable... seizure."

"...Nor shall any state deprive any person of... property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law...."

STATEMENT OF THE CASE

The Petitioner adopts the statement of the case as set forth in the initial Brief in the Eleventh Circuit Court of Appeals; but, was never formally considered (Appendix C).

REASON FOR GRANTING WRIT

Upon consideration of the facts that, prior to, and after the non-jury trial proceedings below on 3/25/86, the Petitioner was an incarcerated prisoner whom was physically incapaciated from appearing before

the court below absent a court order; and, that the law library facility at the institution where prisoner remains incarcerated is inadequate under Bounds v. Smith, 430 U.S. 817 (1977), denial of access to the courts is most assuredly shown in the case sub **judice** based upon the court's Order of denial to grant continuance to procure counsel after granting dismissal of former counsel based on the latter's ineffectiveness and the conflicts of interests thereto. (R27-29)(R30-31). See also Smith v. Bounds, (41 Cr.L 2059)(3/18/87).

Former counsel moved to transport Petitioner on 3/20/86; to no avail (R32); and, trial awarded all properties to Respondent, Mercedes Eischen. (R38-40) Irregardless of "EQUITABLE DISTRIBUTION RULE."

The facts are indisputably certain that the Petitioner was denied access to the courts in the case sub judice as evidenced by the court's denial for transport; and, opportunity to procure new counsel; as well as, granting dismissal of counsel of record upon good cause thereof. In violation of the 14th Amendment.

The fact that Petitioner was denied an opportunity to ascertain professional representation to protect the property interests at stake (14th Amend-

ment right to protect property violation), supports a claim for denial of access to the courts pursuant to the authorities of Bounds v. Smith, supra; Procunier v. Martinez, 416 U.S. 396 (1974); and, Milhouse v. Carlson, 652 F.2d 371 (3d Cir.1981). Access should be "adequate, effective, and meaningful." Bounds, supra. "Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right to access to the courts are invalid." Procunier, supra, note 360, at 419.

At no time prior to or during trial was the Petitioner ever determined to be competent to litigate said case; and, absent the records retained by counsel, whom was dismissed upon the morning of trial, the Petitioner was incapable of such ability ever being ascertained. This was conducted without any fairness whatsoever being accorded Petitioner. The partiality towards Respondent, Mercedes Eischen, is unquestionably shown; and, the Respondent, Honorable Judge Frank N. Kaney, County Judge should have withdrawn on his own motion pursuant to Florida's Code of Judicial Conduct, Canon #3(c)(1). Especially in light of lack of opportunity for Petitioner to move

for recusal thereof under F.S. (1985) §38.10.

No access whatsoever was accorded to Petitioner to protect the property interests at stake hereto based on the prejudicial rulings below. As a result of thus, the Petitioner has lost a vested interest in 50% of the distribution of properties valued at approximately one-hundred and fifty-thousand ($150,000.00). The Petitioner contends that the trial proceedings below violated due process and equal protection under the law in violation of the 14th Amendment; and, denied a fair trial in violation of the 6th Amendment. All of which conveys the unwarranted seizure of properties; and, the fact that such violations are so blatant conveys furthermore that said trial was "void ab initio."

Another point due to be considered in re this cause is that the civil proceedings were initiated by the Respondent, Mercedes Eischen, by and through representations advanced by Respondent, Robert Petree, esquire. Thus raises from another perspective whether a writ of habeas corpus ad Testificandum should issue when civil proceedings are initiated by another other than Petitioner which is a varaiation of the point formerly considered by this Honorable Court pursuant to the authority of Price v. Johnson, 344 U.S. 266 (1948).

In Price, supra, this Honorable Court held in pertinent part that:

> "...Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. Among those so limited is the otherwise unqualified right given by § 272 of the Judicial Code, 28 USC § 294 (now USC s 1641) to parties in all courts of the United States to plead and manage their own cases personally...." (Internal Emphasis Added)

Understanding the law applicable to the United States Courts is distinguishable from laws governing State Courts in undisputable; however, the violations of the Petitioner's constitutional rights in the case at bar should not permit the lack of habeas corpus ad Testificandum petition remedial processes to be unnoticed. The availability of said writ in the Federal Courts is indisputable. See Rivera v. Santirocco, (41 Cr.L 2058)(Ca2 3/23/87); however, no such writ exist under Florida's law.

The question of Florida's law governing access to the Courts is more specifically delineated by the state authorities of Lloyd v. Farkas h, 476 So.2d 305, at 307 (Fl. 1st DCA 1985), citing, Kluger v. White,

281 So.2d 1, 4 (1973), that held in pertinent part that:

> "...(W)here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such rights have become a part of the common law of the state pursuant to Fl. Statute § 2.01 F.S.A., the legislature is without power to abolish such right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries. Unless the legislature can show an overwhelming public necessity for the abolishment of such rights and no alternative method of meeting such public necessity can be shown...."

Under state law, Petitioner was constitutionally entitled access to the courts; and, a reading of McQuiston v. Wanicka, 483 So.2d 489 (Fl.2d DCA 1986), citing, Willingham v. King, 23 Fl. 478 2 So. 851 (1887) is supportive on point; and, provides in pertinent part that:

> "...Even prisoners enjoy a constitutional right of 'access to the Courts. ..." Coleman v. Peyton, 362 F.2d 905, 87 S.Ct. 216, 17 L.Ed 2d 135 (1966)... (t)he right of access to the courts
>
> stems from the First Amendment right to petition for redress of grievances ....Such right may be traceable, in fact, to the MAGNA CARTA. Flood v. State, ex rel. Homeland Co., 95 Fl.

> 1003, 117 So. 385 (1928)...(t)he Constitutional protection of access to the courts....includes access to all courts, both state and Federal, without regard to type of petition or relief sought. Hooks v. Wainwright, 352 F.Supp 163, 167 (M.D. Fl. 1972). See also Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir.1977) (R)easonable access to the courts must include access in general civil legal matters!); Souza v. Travisono, 368 F.Supp 959 (I.1973)....The courts of this state should scrutinize carefully any action taken by the legislature which may place impermissible burden on the exercise of the right of access to the courts. Shay v. First Federal of Miami, Inc., 429 So.2d 64 (Fl.3d DCA 1983)...."The law abhors the denial of access to the courts for any other reason other than a willful abuse of the processes of the court." Rahsad v. Cappiali, 171 So.2d 581 (Fl.3d DCA 1965)..."

Such be the reasoning, Petitioner, Jean E. Eischen, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted

Jean E. Eischen, Pro Se

Polk Correctional Institution

3876 Evans Rd. Box-50

Polk City, Fl. 33868-9213

Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

JEAN E. EISCHEN,
Plaintiff-Appellant,

v.

HONORABLE FRANK N.KANEY,

MERCEDES EISCHEN,

ROBERT G. PETREE,

Defendants-Appellees.

Before

Hill, Fay and Clark, Circuit Judges

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-3678

JEAN E. EISCHEN,

Plaintiff-Appellant,

v.

HONORABLE FRANK N. KANEY,

CIRCUIT JUDGE

OF ORANGE COUNTY COURTHOUSE; ET AL.,

Defendant-Appellee.

Before

Hill, Fay and Clark, Circuit Judges

BY THE COURT:

Appellee Kaney's motion to dismiss the appeal as frivolous (is granted).

Further, Appellant's motion to strike Appellee's motion to dismiss is (denied)

Appendix

"A"

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-3678

JEAN E. EISCHEN,

Plaintiff-Appellant,

v.

HONORABLE FRANK N. KANEY,

CIRCUIT JUDGE

OF ORANGE COUNTY COURTHOUSE; ET AL.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC (opinion February 9, 1988, 11 Cir., 198__, ___F.2d

(Mar 08 1988)

Before

Hill, Fay and Clark, Circuit Judges.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit

Rule 35-5),

( ) The Petition(s) for Rehearing are denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing in Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the Judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

ORD-42

Appendix
"B"

STATEMENT OF THE FACTS

(Excerpts from 5th DCA Record)

(1) Upon June 11th, 1985, Appellee, Mercedes Eischen Petitioned for dissolution of marriage in the Ninth Judicial Circuit's Orange County Courthouse. (Case No: 85-7107)(R1-3)(Record on appeal on 5th DCA: 86-712). Petition filed by Appellee, Petree.

(2) Upon June 17th, 1985, Counsel of Record, Mr. James Valerino, filed Notice of Appearance (R19).

(3) Upon March 20th, 1986, the Appellee's counsel moved to transport the Appellant (R26)

(4) Upon March 24th, 1986, the Court denied same; but, thus was not entered upon the record til March 26, 1986 (R32).

(5) Upon March 25th, 1986, the Appellant's Motion to Dismiss Counsel; and, for Extension of Time, was granted in part, and, denied in part (R27-29)(R30-31).

(6) Upon March 25th, 1986 trial was had w/o Appellant; and, final-judgment was issued in favor of Appellee, Eischen. (R38-40)(Attached hereto as Appellant's Exhibit #1) provided in pertinent part that:

> (at p.3) "...Counsel of record has failed to adequately consult the Defendant in re of any defense and

right accessible to the Defendant during his litigation; and, the belated petition for a writ of habeas corpus ad Testificandum that counsel is presently in the process of purporting before this Honorable Court to attempt to procure my presence before this Court during said hearing of the 25th day of March, 1986. No investigation nor preparations are known to have transpired.

...Due to the nature of the prior convictions, grievances relative to counsel's representation previously litigated, and soon forthcoming, the Defendant perceives counsel's interests are not impartial, unbiased, or unprejudiced; and, the lack of effectiveness conveyed hereto in re of this cause supports such a belief...."(p.4)
(Internal Emphasis Added)

(at p.) "...Therefore, an extension of time for the procurement of new counsel is heretofore sought to be ascertained due to the Defendant's inability to competently represent his best interest upon his own behalf; and, in the interest of the orderly administration of justice, the Defendant respectfully prays that this Honorable Court grants a reasonable amount of time to accord the Defendant an opportunity to procure counsel, or appoint counsel...." (1)

In furtherance, the Appellant argues accordingly as follows:

F.N. (1) Based on "exceptional circumstances," Wahl v. McIver, 773 F.2d 1169 (11th Cir. 1985).

Proof of Service.

I hereby certify that a true and correct copy has been furnished via U.S. Mail to each of the Respondents, Robert Petree, Esquire, 1111 E. Amelia Street, Orlando, Florida 32803; Honorable Franklin N. Kaney, Circuit Judge, Ninth Judicial Circuit, Orange County Courthouse, Orlando, Fl. 32801; and, Mercedes Eischen, 7744 Clubhouse Estates, Orlando, Fl. 32819 upon this 13th day of July in the year of Our Lord and Savious, one-thousand nine-hundred and eighty-eight.

Sincerely yours,

Jean E. Eischen
(Petitioner)
Mr. Jean E. Eischen